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# Sex Discrimination and Title VII of the Civil Rights Act of 1964

Robert Stevens Miller, Jr.\*

## INTRODUCTION

The Civil Rights Act of 1964 is the most comprehensive assortment of legislative aids to disadvantaged minorities in our nation's history. Cast against the background of the Negro Revolution, the act stands out as the response from Congress to the problems of discrimination in our society. Sweeping provisions grant the Negro equal access to voting booths,<sup>1</sup> to public accommodations,<sup>2</sup> and to employment.<sup>3</sup> Nearly forgotten amid the flood of publicity devoted to the racial aspect of the act is another significant beneficiary—the woman. The Civil Rights Act makes it as unlawful for an employer to deny a job to a person on the basis of sex as on the basis of race.

The act appears to treat these two bases of discrimination, race and sex, in the same terms; yet there is reason to believe that the problems in the two areas are quite different. This article considers the special problems raised by the ban on discrimination on the basis of sex by means of an analysis of the provisions of the act, a description of the legislative history of the sex provisions, and a discussion of the constitutional and legislative aspects of classification by sex. There follows an analysis of the approach taken by the Equal Employment Opportunity Commission, and finally a discussion of some of the problems raised by state legislation relating to classification by sex.

## I. THE BASIC PROVISIONS OF TITLE VII

Title VII of the act, the Equal Employment Opportunity title, declares a new national policy which forbids any employment discrimination based on race, color, religion, sex, or national origin, in nearly all industries affecting interstate commerce. It imposes new obligations on employers, labor unions and employment agencies. It grants new rights to employees, job seekers and disadvantaged minorities. It establishes a five

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1. 42 U.S.C. § 1971 (1964).

2. *Id.* §§ 2000a-2000b-3 (1964).

3. *Id.* §§ 2000e-2000e-15 (1964).

member Equal Employment Opportunity Commission<sup>4</sup> to guide the administration of the act and to encourage compliance with it.

The heart of the new law is the obligation which it imposes on employers through the following provisions:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .<sup>5</sup>

[It shall be an unlawful employment practice for an employer] to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>6</sup>

Parallel provisions proscribe discriminatory conduct by employment agencies in referring or classifying job applicants.<sup>7</sup> Labor unions are prohibited from excluding or expelling any individual from membership on the basis of race, color, religion, sex, or national origin,<sup>8</sup> or so acting as to deprive an individual of equal employment opportunities.<sup>9</sup> Further, apprenticeship and on-the-job training programs must be administered by employers and unions on a nondiscriminatory basis.<sup>10</sup>

There are, however, various exceptions to these general prohibitions in specific instances. An educational institution supported by a religion<sup>11</sup> is specifically exempted from the act's proscriptions. Employers with fewer than seventy-five employees are presently exempt from coverage, although the number will be reduced annually until it reaches twenty-five.<sup>12</sup> Dis-

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4. In May of 1965, President Johnson appointed five members to comprise the Equal Employment Opportunity Commission, with Franklin D. Roosevelt, Jr., as chairman. The Commission employs a staff of several hundred persons, with headquarters in Washington, D.C. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FACTS ABOUT TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (1965).

5. 42 U.S.C. § 2000e-2(a) (1) (1964).

6. *Id.* § 2000e-2(a) (2).

7. *Id.* § 2000e-2(b).

8. *Id.* § 2000e-2(c) (1).

9. *Id.* § 2000e-2(c) (2)-(3).

10. *Id.* § 2000e-2(d).

11. *Id.* § 2000e-2(e).

12. *Id.* § 2000e(b). This subsection defines "employer" to exclude those employing fewer than 100 employees. This exclusion applied during the first year after the effective date of the Title, July 2, 1965. During the second year the relevant number of employees became 75;

crimination is allowed where necessary for compliance with a government security program.<sup>13</sup> Moreover, discrimination is specifically allowed with respect to members of communist organizations.<sup>14</sup> Preferential treatment of Indians living on or near a reservation is also excepted from proscription.<sup>15</sup>

These exceptions to Title VII are generally narrow in scope and relatively easy to interpret. There is, however, one exception of broad significance, particularly for the problem of sex discrimination: the subsection which provides that it is not an unfair employment practice to discriminate against an individual,

. . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .<sup>16</sup>

The concept of a "bona fide occupational qualification" phrased in terms of reasonable necessity and normal operation is the key to the enforcement of the act as it relates to sex discrimination. The language is at best ambiguous, and admits of a wide range of possible interpretations. Narrowly read, the provision permits sex discrimination only in extreme cases, such as washroom attendants or actors and actresses. However, the exception could be read broadly enough to deny a woman any job which an employer, his other employees, or his customers deem to be a "man's job."

There is, unfortunately, no other language in Title VII which helps clarify the imprecise concept of a "bona fide occupational qualification." The search for guidance in its interpretation leads naturally to two sources: the legislative history of the statute, and the national policy of sex classification as found in constitutional interpretation and legislative action.

## II. THE LEGISLATIVE HISTORY

In a broad sense, the legislative history of the Civil Rights Act of 1964 is coextensive with our nation's history. Even in the narrow sense, the history of the act is spread over thousands of pages of committee hearing transcripts,<sup>17</sup> *Congressional Rec-*

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during the third year, the number drops to 50; and thereafter the number will be 25.

13. *Id.* § 2000e-2(g).

14. *Id.* § 2000e-2(f).

15. *Id.* § 2000e-2(i).

16. *Id.* § 2000e-2(e).

17. The hearings before the House Committee on the Judiciary concerning the Civil Rights Bill and related proposals are contained in four bound volumes totalling 2780 pages. *Hearings Before Subcom-*

ord debate,<sup>18</sup> and newspaper accounts.

The bill reported out of committee in November of 1963 was quite similar to the final act. It had taken shape during four months of exhaustive committee hearings in the summer of 1963 in which interested groups had generous opportunities to present their views to the committee.<sup>19</sup> The bill, however, contained no ban on sex discrimination; rather, its Equal Employment Opportunity Title prohibited only discriminations based on race, color, religion, or national origin. In fact, the matter of sex discrimination had not even been considered during the hearings.<sup>20</sup> In view of the political pressures which surrounded the bill, it is hardly surprising that no one viewed it as a vehicle to secure equal rights for women.

After a favorable report by the Judiciary Committee, the bill went to the House Rules Committee, presided over by the bill's principal opponent, Representative Howard Smith of Virginia. It was on the last day in the House Rules Committee that the word "sex" first appeared in the record in relation to Title VII; at that time a motion to add sex to the proscribed bases of discrimination was defeated 8-7.<sup>21</sup> Thus, on January 30, 1964, the House of Representatives began consideration of a civil rights bill which was still limited to prohibition of discrimination on ethnic grounds.

The heated debate on the House floor lasted nearly two weeks, but "sex" discrimination was not considered until the day before the passage of the act. Representative Howard Smith proposed an amendment to include sex within the discrimination bases banned by Title VII.<sup>22</sup> Smith professed to be serious about the matter, claiming that women have just as much right to be

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mittee No. 5 of the Committee on the Judiciary of the House of Representatives on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States, 88th Cong., 1st Sess. (1963).

18. The prolonged and intense debate that preceded passage of the Civil Rights Bill in the Senate lasted for eighty-three days. 110 CONG. REC. 2882-14506 (1964).

19. During the course of these hearings, the testimony related to all the subjects of the legislative proposals. . . . The subcommittee afforded to all who were interested a reasonable opportunity to present their views on the proposals. Those who did not appear personally were given an opportunity to submit any relevant matter for the record.

H.R. REP. NO. 914, 88th Cong., 1st Sess. 17 (1963).

20. See *Hearings on Civil Rights*, *supra* note 17.

21. 20 CONG. QUARTERLY 344 (1964); N.Y. Times, Jan. 31, 1964, p. 12, col. 3.

22. 110 CONG. REC. 2577 (1964).

free from discrimination as any other minority group. "This bill is so imperfect, what harm will this little amendment do?" he asked.<sup>23</sup> Another Southern Congressman, who characterized himself as "vigorously opposed" to the whole bill, added that, "some men in this country might support legislation which would discriminate against women, but never let it be said that a southern gentleman would vote for such legislation."<sup>24</sup>

Representative Emanuel Celler of New York, the floor manager of the bill, led a half-hearted opposition to the amendment. It was difficult for anyone to speak against the amendment without appearing to favor discrimination against women, a position politically dangerous and hard to defend logically. All Celler could say was, "I think the amendment seems illogical, ill timed, ill placed, and improper."<sup>25</sup> He read into the *Record* an excerpt from the *Report of the President's Commission on the Status of Women*, which concluded:

[D]iscrimination based on sex, the Commission believes, involves problems sufficiently different from discrimination based on the other factors listed to make separate treatment preferable.

In view of this policy conclusion reached by representatives from a variety of women's organizations and private and public agencies to attack discriminations based on sex separately, we are of the opinion that to attempt to so amend H.R. 7152 would not be to the best advantage of women at this time.<sup>26</sup>

Many Congresswomen took the opportunity to deplore the suppressed role of women in American life. The appeals in favor of the amendment were based largely on emotional reactions and at times bordered on irrelevancy.<sup>27</sup> Fears were ex-

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23. *Ibid.*

24. *Id.* at 2583.

25. *Id.* at 2578.

26. *Id.* at 2577. The quoted excerpt was included in a letter to Representative Celler from the Women's Bureau of the Department of Labor concerning the inclusion of sex provisions in Title VII.

27. In speaking in favor of the amendment, Mrs. Griffiths of Michigan stated:

Mr. Chairman, a vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister.

110 CONG. REC. 2580 (1964). Mrs. St. George of New York said:

We do not want special privileges. We do not need special privileges. We outlast you—we outlive you—we nag you to death. So why should we want special privileges?

I believe we can hold our own. We are entitled to this little crumb of equality.

The addition of that terrifying little word "s-e-x" will not hurt this legislation in any way. In fact, it will improve it. It will make it comprehensive. It will make it logical. It will

pressed that without the sex amendment to Title VII, Negro women would be given an advantage over white women.<sup>28</sup> Only one Congresswoman, Oregon's Edith Green, generally regarded as a champion of equal rights for women, spoke against the amendment. Since a few months earlier she had succeeded in having the Equal Pay Act of 1963 passed over the strenuous objections of the suddenly chivalrous Southerners, it is not surprising that she expressed some doubt as to their good faith:

As much as I hope the day will come when discrimination will be ended against women, I really and sincerely hope that this amendment will not be added to this bill. It will clutter up the bill and it may later—very well—be used to help destroy this section of the bill by some of those very people who today support it.<sup>29</sup>

The discussion of the sex amendment lasted almost two hours, but the record provides little indication of congressional intent as to interpretation of the amendment. Following an affirmative teller vote of the House,<sup>30</sup> the word "sex" was inserted in each place where the words "race, color, religion, or national origin" appeared. The excessive haste involved is further evidenced by Smith's admission on the next day that he had forgotten to insert "sex" in a number of places in Title VII where it now belonged.<sup>31</sup>

The bill encountered several months of prolonged and heated debate in the Senate. The problem of discrimination on the basis of sex, however, was never seriously considered. The proponents of the bill had decided that the paramount interest of

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make it right.

*Id.* at 2581.

28. Mrs. Griffiths of Michigan pointed out this problem of possible disadvantage to white women based on the fear that employers, overzealous in their efforts to comply with the new ban on racial discrimination or to avoid prosecution, would give preferential treatment to Negro women that would be denied to white women.

I rise in support of this amendment primarily because I feel as a white woman when this bill has passed this House and the Senate and has been signed by the President that white women will be last at the hiring gate.

*Id.* at 2578.

29. *Id.* at 2581. All nine members of Congress who joined Mrs. Green in voicing opposition to the sex amendment voted for the Civil Rights Bill as a whole. Conversely, only one of the eleven male members who spoke in favor of the amendment voted for the Civil Rights Bill as amended.

30. The teller vote, by means of which an accurate tally of votes is made without recording the votes of the individual Congressmen, resulted in a margin of 168-133 in favor of the sex amendment. 110 CONG. REC. 2584 (1964).

31. 110 CONG. REC. 2720 (1964).

getting the bill passed precluded any major alteration of the House version, since changes would necessarily involve additional discussion and further delay of final action.<sup>32</sup> Thus the sex provision went without challenge, and virtually without mention. The Senate debates are therefore of no assistance in interpreting the act's proscription of employment discrimination on the basis of sex.

Consequently, the legislative history is little help to the Equal Employment Opportunity Commission in administering that part of Title VII forbidding sex discrimination. Moreover, it is not unfair to label the sex amendment an "orphan,"<sup>33</sup> for apparently only a handful of Congressmen actually supported both the addition of sex to Title VII, and the bill as so amended.<sup>34</sup> Congresswoman Green was undoubtedly correct in her judgment that as a separate bill, the sex amendment would have had little chance of passage.<sup>35</sup> Hence, the sex provisions of Title VII can

32. 20 CONG. QUARTERLY 357 (1964).

33. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 79 (1964).

34. 110 CONG. REC. 2581 (1964). In a letter to the author, Jan. 17, 1966, Mrs. Green commented:

The very people who most strongly opposed this bill . . . became the strongest advocates of the "sex amendment." . . . As if this were not enough of a clue to its mischievous intent, the fact that the sponsor of the amendment was the leader of the civil rights opposition in the House left no room for doubt. I believed then, and I believe now, that the "intent" of the sponsor of the bill was to enlist additional opposition to Title VII of the Civil Rights Bill. Fortunately this tactic did not succeed, but at the time it was by no means certain that it would not.

In addition I opposed the amendment because it was hastily drawn and without the benefit of any hearings. . . . Any law which will affect millions of citizens deserves greater consideration than this, and it was immediately apparent that harrassing and needlessly annoying problems could ensue from enactment of such a broadly drawn amendment.

A contrary position is expressed in a letter to the author from Representative Smith, Jan. 4, 1966:

The statement that the amendment was "slipped in" the bill by me in an attempt to delay voting, is utterly untrue, as the record shows.

The amendment was a popular one. Particularly active in its adoption were the women Members of the House. It was debated fully and adopted in the House in open debate, and subsequently approved in the Senate.

35. Congresswoman Green took the occasion of the perfecting amendment to deplore once again the impropriety of the whole matter:

[I]n my judgment, if this amendment . . . were being considered by itself, and it were brought to the floor with no hearings and no testimony, such a piece of legislation would not receive one hundred votes. In fact, it would probably be laughed off the floor by some of the gentlemen who this week are seem-



be viewed more as an accidental result of political maneuvering than as a clear expression of congressional intent to bring equal job opportunities to women.

Since the legislative process surrounding the sex provisions falls far short of the ideal, it might be concluded that sex discrimination should be ignored, or at least played down, in the administration of the act. "Why should a mischievous joke perpetrated on the floor of the House of Representatives be treated by a responsible administrative body with this kind of seriousness?" inquired one periodical,<sup>36</sup> upon learning of the Equal Employment Opportunity Commission's active concern with women's employment opportunities. The answers to that question lie beneath the surface of the limited discussion that occurred in Congress.

Congress was moved to enact Title VII by the appalling statistics concerning the economic status of the Negro American. Striking similarities exist in the corresponding statistics concerning women. Women predominate only in such positions as clerical work and private household employment;<sup>37</sup> supervisory and managerial positions are strictly male dominated.<sup>38</sup>

More significantly, within each general category of employment, the median income of women is about half that of men in the same field.<sup>39</sup> Whatever may be said for their accuracy, such statistics corroborate what is generally assumed: men have a distinct advantage over women in employment opportunities, job advancement, and compensation. Consequently, regardless of the political motivation of the sex provisions of Title VII, there is an economic justification for such legislation.

Further, it would be wholly inaccurate to assume that the ban on sex discrimination was merely an innovation of Representative Smith which suddenly appeared on the floor of the House. The President's Commission on the Status of Women had

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ingly giving it its strongest support, some of whom are openly and honestly seeking to kill the entire bill.

110 CONG. REC. 2720 (1964).

36. The New Republic, Sept. 4, 1965, p. 10.

37. Among "clerical workers," females outnumber males by a ratio of more than 2 to 1. Among "private household workers," females outnumber males by a ratio of nearly 40 to 1. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 230-35 (86th ed. 1965).

38. *Ibid.*

39. *Ibid.* It is interesting to note that the median income of male workers in each occupational classification stays about double that of females in the same classification over the whole range of classifications from the lowest paid to the highest.

recommended an equal opportunity bill for women, but because of the special problems involved its inclusion in the Civil Rights Bill was not recommended. Successful passage during the previous session of the Equal Pay Act of 1963<sup>40</sup> demonstrates that Congress was willing to respond to the demand for fairer treatment of women. Accordingly, it would be a mistake to place too much emphasis on the particular circumstances in which the ban on sex discrimination was passed.

### III. LEGAL ASPECTS OF CLASSIFICATION BY SEX

The exception to the prohibition of discrimination on the basis of sex in "those certain instances where . . . sex . . . is a bona fide occupational qualification . . ."<sup>41</sup> permits a broad range of judicial and administrative interpretation. Since legislative history is not particularly helpful in this regard, one must turn to an additional source of guidance: the national policy with respect to classification on the basis of sex, as derived from judicial interpretation of the Constitution and from legislative action. A desirable interpretation of Title VII should be consistent with this national policy. Thus, if there are important differences between the legal backgrounds of classification by sex and by ethnic group it is likely that a different kind or degree of enforcement of the sex provisions of the act is desirable. Conversely, if there are close analogies in the legal developments, the sex provisions should be enforced with the same spirit and vigor that characterizes enforcement of the ethnic provisions.

The Constitution is the first point of reference in assessing the legal position of women in America. The only express mention of classification by sex is found in the nineteenth amendment, which guarantees women the right to vote. The language of the amendment is precisely parallel to the fifteenth amendment, which guarantees that right to Negroes. Thus, it appears that the Constitution, insofar as it has affirmatively proscribed sex discrimination, does so in the same manner that it proscribes racial discrimination. Of course, the scope of these provisions is limited to voting rights.

Constitutional bans on sex and racial discrimination in voting rights are quite different from the ban on discrimination in the economic and social legislation of the states. With regard to the latter, the Constitution is applicable through the due process and

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40. 77 Stat. 56 (1963), 29 U.S.C. § 206(d) (1964).

41. 42 U.S.C. § 2000e-2(e) (1964).

equal protection clauses of the fourteenth amendment. Unlike the area of voting rights, here the Constitution is translated by the Supreme Court into different languages, one for classifications based on race, and another for classifications based on sex.

The scope of the due process clause has been litigated with respect to discrimination in the area of jury selection on numerous occasions. An early case, *Strauder v. West Virginia*,<sup>42</sup> held that discrimination by the states on the basis of race as to jury duty was invalid, but that the same was not true of discrimination on the basis of sex. More recently, *Ballard v. United States*,<sup>43</sup> held that women could not be excluded from federal juries, but this decision was based on the supervisory power over federal courts rather than on due process grounds. The court said that "the two sexes are not fungible."<sup>44</sup> Thus, it is significant that even as to a function of citizenship, where discriminations are most susceptible to elimination, distinctions on the basis of sex are still permitted.

The principal weapon utilized in constitutional attacks on discrimination has been the equal protection clause. For the Negro, the equal protection clause has prevented discriminatory state legislation, and since *Brown v. Board of Education*,<sup>45</sup> the scope of the constitutional ban on racial discrimination has been expanded to include private action having even the most tenuous link with state action.<sup>46</sup> These decisions have no doubt encouraged positive action by the legislatures, such as Congress' passage of the Civil Rights Act of 1964, to further eradicate racial barriers, even at the level of private decision.

Turning to the problem of sex discrimination, the contrast is startling. State legislation which treats the female sex as a special class in a variety of contexts has survived constitutional attack in every Supreme Court case. The Court's willingness to accept the legislative judgment that sex is a valid basis for classification has precluded any real challenge to the reasonableness of such classification.<sup>47</sup>

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42. 100 U.S. 303 (1879).

43. 329 U.S. 187 (1946). For a recent discussion of the constitutional right of women defendants not to have women excluded from the jury, see 51 MINN. L. REV. 552 (1967).

44. *Id.* at 193.

45. 347 U.S. 483 (1954).

46. *E.g.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

47. The Supreme Court, in *Muller v. Oregon*, 208 U.S. 412 (1908), held valid a maximum hour law, stating that sex is a valid basis for classification. *Id.* at 422. This language has been broadly applied in

The sharp contrast between constitutional doctrines in the areas of sex and racial classifications must be considered as a relevant factor by the Equal Employment Opportunity Commission in interpreting Title VII. The growing and well-defined national policy that a man should be measured by his individual worth, with his race regarded as an irrelevancy, points the way for the Commission in that area. Hence, a vigorous application of a law banning discrimination in employment against individuals on the basis of race is justified.

Just as clearly, our national policy with respect to equality for women has not been aimed at the same goal. Conceding that women are or should be entitled to the same rights as men with respect to citizenship, few foresee or hope for a day when a person will be viewed as an individual without regard to sex. Even the Civil Rights Act contemplates some valid distinctions between the sexes in the exception for a "bona fide occupational qualification," which is not available as to classification on the basis of race or color.<sup>48</sup>

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subsequent cases involving attacks on state laws which classify on the basis of sex.

*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), concerned the validity of minimum wage laws for women. The Court answered the contention that the applicability of the statute only to women was an arbitrary discrimination:

The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest."

*Id.* at 400. However, four dissenting justices argued that:

Difference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all working women from which like contracts of all working men are left free. Certainly a suggestion that the bargaining ability of the average woman is not equal to that of the average man would lack substance. The ability to make a fair bargain, as everyone knows, does not depend upon sex.

*Id.* at 413.

*Goesaert v. Cleary*, 335 U.S. 464 (1948), upheld under the equal protection clause a Michigan statute which forbade hiring female barmaids:

Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes.

*Id.* at 465.

48. The text of the exception is quoted at note 16 *supra*. Since discrimination on the basis of religion or national origin contravenes

Although the Constitution has been held not to prevent laws based on sex classification, agreement with this doctrine has been far from universal. The leading case espousing the doctrine,<sup>49</sup> was criticized during the House debate on the sex amendment to the Civil Rights Bill.<sup>50</sup> Support for constitutional invalidity of statutory sex classifications has been strongly advanced in a recent law review article<sup>51</sup> suggesting either constitutional amendment or judicial action.

A proposed equal rights constitutional amendment, which would invalidate most state legislative classifications on the basis of sex,<sup>52</sup> has been introduced in every Congress since 1923. The proposal passed the Senate twice,<sup>53</sup> but with qualifications that considerably weakened the amendment's effectiveness.<sup>54</sup> Presently, there appears little chance that such an amendment will be adopted.

The argument that statutory sex classifications are constitutionally invalid rests on the equal protection clause. The proponents of this view would extend the reasoning of *Brown* to the area of sex discrimination:

Although the "classification by sex" doctrine was useful in sustaining the validity of progressive labor legislation in the past, perhaps it should now be shelved alongside the "separate but equal" doctrine. It could be argued that, just as separate schools for Negro and white children by their very nature cannot be "equal," classification on the basis of sex is today inherently unreasonable and discriminatory.<sup>55</sup>

Such an argument hardly follows from the reasoning of *Brown*. There the statement that separate educational facilities are inherently unequal,<sup>56</sup> resulted from a finding that the policy

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national policy in the same manner as race discrimination, the exception should be narrowly interpreted. This was indicated in the House Report on the Civil Rights Bill, H.R. REP. NO. 914, 88th Cong., 1st Sess. 27 (1963). The report was issued before sex was added to the bill, so there is no comment on the particular problems of the sex provision.

49. *Goesaert v. Cleary*, 335 U.S. 464 (1948).

50. 110 CONG. REC. 2580 (1964) (remarks of Representative Griffiths of Michigan).

51. Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965); see 51 MINN. L. REV. 552 (1967).

52. PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS 32 (1963).

53. 96 CONG. REC. 870-73 (1950); 99 CONG. REC. 8954-55 (1953).

54. The additional provision added to the amendment has provided that it "shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law upon persons of the female sex." 99 CONG. REC. 8955 (1953).

55. Murray & Eastwood, *supra* note 51, at 240.

56. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

of separating the races is usually interpreted as denoting the inferiority of the Negro group.<sup>57</sup> The same cannot be said of separation of the sexes, for this separation ordinarily rests on valid differences in the biological and psychological composition of the two sexes. The existence of separate educational facilities, for example, reflects either a difference in the particular interests of one sex grouping, or a desire to preserve an educational atmosphere free of coeducational distractions. It does not usually denote the inferiority of one of the sexes.<sup>58</sup>

However one views the controversy over equal rights for women, it cannot be denied that at present the Constitution permits classification on the basis of sex for a wide variety of legislative purposes. The fact that sex classification stands on so different a constitutional footing from race classification must be considered in formulating policies to best carry out the purposes of Title VII.

The differences in the scope of permissible legal discrimination on the basis of sex and the other factors of Title VII reflect the attitudes of the public. Women are biologically different from men, and have traditionally assumed a different role in our society. Few question the propriety of a men's club, a sexually categorized school, or even a transportation facility for men only.<sup>59</sup> Yet the same type of separation if based on race is either unlawful per se, unlawful when carried out by public authority, or at the very least looked upon with disfavor as being contrary to national policy.

Since a consideration of the legal background of classification on the basis of the factors listed in Title VII reveals sharp distinctions, it is unfortunate and perhaps misleading that the prohibition on discrimination lists "race, color, religion, sex, or national origin" in such a way that they appear to call for identical interpretation. Such an interpretation also ignores our different national policies with respect to sex classification as opposed to the others. The ban on sex discrimination and the prohibition of other forms of discrimination should be viewed separately; the enforcement of the mandate of the Civil Rights

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57. *Id.* at 494.

58. *But see* Murray & Eastwood, *supra* note 51, at 233-35.

59. It is interesting to note that United Air Lines has for a number of years operated "Executive" flights limited to male passengers without offering any simultaneous service to women. This industry has been closely regulated by the federal government, and there is no question that a racially restricted service would have been neither contemplated by the airlines nor tolerated by the government.

Act of 1964 should be carried out in a manner consonant with the developing national policies relevant to each case.

#### IV. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Civil Rights Act establishes an Equal Employment Opportunity Commission<sup>60</sup> charged with guiding implementation of the substantive provisions of Title VII. One version of the Civil Rights Bill<sup>61</sup> would have patterned the Commission after the National Labor Relations Board, which has been so successful in administering the National Labor Relations Act.<sup>62</sup> As created, the five member Commission, appointed by the President for staggered five year terms with guaranteed political balance,<sup>63</sup> is structurally parallel to the NLRB. However, the principal weapon contributing to the success of the NLRB, the cease and desist order,<sup>64</sup> has been withheld from the Commission. Instead, the Commission must await the filing of charges by aggrieved persons, and then investigate and attempt to encourage conciliation and compliance with the law.<sup>65</sup> Where definite patterns or practices of discrimination are found, the Commission can ask the Attorney General to bring an appropriate action authorized by the act.<sup>66</sup>

Subsequent to Title VII's passage, the House of Representatives considered a bill which would replace Title VII, strengthening enforcement measures, principally through introduction of the cease and desist order.<sup>67</sup> The Committee on Education and Labor of the House stated in its favorable report on the bill that:

It is . . . imperative that effective enforcement authority be granted to the Commission. While the justification for this is not new, it is compelling. The history of similar programs established without enforcement provisions is proof enough. A hollow declaration of rights without the means of asserting such rights is a sham which degrades the law and makes a mockery of the declared national policy.<sup>68</sup>

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60. 42 U.S.C. § 2000e-4 to -15 (1964).

61. S. 1937, 88th Cong., 1st Sess. (1963).

62. See 49 Stat. 451 (1935), 29 U.S.C. § 153 (1964).

63. 42 U.S.C. § 2000e-4(a) (1964) provides in part: "[T]he Equal Employment Opportunity Commission . . . shall be composed of five members, not more than three of whom shall be members of the same political party. . . ."

64. National Labor Relations Act § 10(c), 49 Stat. 454 (1935), 29 U.S.C. § 160(c) (1964).

65. 42 U.S.C. § 2000e-5(a) (1964).

66. *Id.* § 2000e-4(f) (6).

67. H.R. 10065, 89th Cong., 1st Sess. (1965).

68. H.R. REP. No. 718, 89th Cong., 1st Sess. 2 (1965). In testimony

Thus, there exists some congressional sentiment favoring a significant increase in the power of the Commission. Such an increase in power would have a beneficial effect on the eradication of racial discrimination where the issues are relatively clear cut, and the principal problem is one of effective enforcement. With respect to sex discrimination, however, the desirability of allowing the Commission to issue cease and desist orders is less clear. Issuance of such orders would reduce the Commission's flexibility, since the Commission would be required to determine and articulate its policies to a much greater extent. Further, the Commission arguably should be able to avoid specific pronouncements on sex discrimination until it has gained greater experience, facilitating more intelligent decisions. These arguments, however, are not persuasive. The Commission could always reverse or modify a previous policy. Articulation of the grounds for decision in specific cases would provide employees and employers a much more reliable guide to their rights and duties under the act. These advantages, in addition to the strengthening of enforcement measures, would seem to justify empowering the Commission to issue cease and desist orders.

In the first six months following the effective date of the act, the Commission was inundated by some three thousand complaints of unfair employment practices,<sup>69</sup> most of which involved hiring practices. An overwhelming majority of the complaints alleged racial discrimination against Negroes. The only other significant category of discrimination charged was sex discrimination, involving about one-sixth of the cases. However, in the instances of sex discrimination, the principal concern was not with hiring but with layoff and seniority.<sup>70</sup> This is interesting since a primary objection to the sex provisions of Title VII was a fear that women in large numbers would invade the job areas jealously guarded by men, thus upsetting traditional patterns of employment.<sup>71</sup> The actual experience under the act

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before the committee, the Chairman of the Commission, Mr. Franklin D. Roosevelt, Jr., stated:

One point on which there is surely agreement is that there is a need for statutory procedures to compel compliance. . . .

There is a substantial preference for administrative enforcement. . . . [C]onciliation is most successful when the parties know that effective machinery for enforcement is readily at hand.

*Id.* at 20.

69. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INFORMATION (Jan. 27, 1966).

70. *Ibid.*

71. 110 CONG. REC. 2577 (1964) (remarks of Representative Celler).



has been that women are more interested in fair treatment once they have assumed a job than in equal access to jobs.<sup>72</sup>

While the problem of sex discrimination has been involved in only about one-sixth of the complaints received by the Commission, it has consumed a much higher proportion of the time of the legal department of the Commission.<sup>73</sup> To answer the many questions raised by the sex provisions, the Commission has handed down various opinions<sup>74</sup> and guidelines<sup>75</sup>. Most of these rulings involved enforcement procedures.

In December, 1965, the Commission published its *Guidelines on Discrimination Because of Sex*.<sup>76</sup> The *Guidelines* approach the problem of the "bona fide occupational qualification" in a negative fashion, describing a number of factors which are not valid bases for discrimination. The only affirmative admission of an exception is in a narrow area: "Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress."<sup>77</sup>

One approach taken to the problem in the *Guidelines* is that applicants for jobs, male or female, must be treated as individuals rather than as members of a class. Thus, an employer cannot rely on the bona fide occupational qualification provision to refuse to hire a woman on the assumption that the turnover rate among females in general is higher than among males. The same principle applies to stereotyped characterizations of the relative abilities of men and women for a particular job. An individual cannot be refused a job merely because other members of his or her sex have made a poor showing in that occupation.<sup>78</sup>

The *Guidelines* go further, however, and state that an unlawful employment practice is committed in every case where there is a "refusal to hire an individual because of the preferences of co-workers, the employer, clients, or customers."<sup>79</sup> It

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72. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 69.

73. Interview with Senior Attorney of the Legal Department of the Equal Employment Opportunity Commission in Washington, D.C., Jan. 21, 1966.

74. See, e.g., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DIGEST OF LEGAL INTERPRETATIONS ISSUED OR ADOPTED BY THE COMMISSION (Oct. 8, 1965).

75. Equal Employment Opportunity Commission, *Guidelines on Discrimination Because of Sex*, 30 Fed. Reg. 14927-28 (1965).

76. *Ibid.*

77. *Id.* § 1604.1(a) (2).

78. *Id.* § 1604.1(a) (1).

79. *Id.* § 1604.1(a) (1) (iii).

would seem that in some cases it might be very important to the working harmony of a particular group of workers that all be of the same sex. In a service industry, for example, it might be important to clients that the employees be of one sex, or a university may prefer that the Dean of Women be a woman.<sup>80</sup> The same arguments could, of course, be made in cases of discrimination on the basis of religion or national origin, but in those cases there is such a clear national policy that the desires of co-workers or customers must be subordinated. The question does not even arise with respect to race discrimination, since that is not a permitted ground of discrimination under the "bona fide occupational qualification" exception.

With respect to advertising for employment, the Commission requires that preferences of employers not be expressed unless sex is a bona fide occupational qualification.<sup>81</sup> "Help wanted—male" columns in newspapers must be recaptioned, "Jobs of interest—males," with an appropriate notice that the listing is not intended to be exclusory but merely for the convenience of the reader.<sup>82</sup> To further inform individuals of their rights under the law, and of the procedure for filing a complaint, the employers, unions, and agencies covered by the act are required to post at conspicuous locations a poster prepared by the Commission<sup>83</sup> which summarizes the pertinent provisions of Title VII.

The approach of the Commission as evidenced by its publications has been fairly rigid. A narrow interpretation of the bona fide occupational qualification exception has been announced, suggesting that only the most extreme cases will qualify for the exception. There are at least two possible justifications for this approach. One is that it resolves the issues in a clear manner. Another possible justification is that this approach gives maximum leverage for enforcement where needed, while the desired flexibility at this early stage is achieved by selective enforcement of only the more obvious abuses. At any rate, the relative paucity of complaints concerning hiring on the basis of sex may suggest that, practically, the problem is not of sufficient magnitude to warrant more subtle interpretations of the act.

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80. This example was suggested in a letter from Representative Green to the author, Jan. 17, 1966.

81. This requirement of the Commission is authorized by 42 U.S.C. § 2000e-3 (1964).

82. Equal Employment Opportunity Commission, *Guidelines*, *supra* note 75, § 1604.4.

83. 42 U.S.C. § 2000e-10 (1964).

## V. THE PROBLEMS RELATING TO STATE LAWS

Title VII enters a field containing numerous potential conflicts with existing state laws. These state laws are of two basic types: the state fair employment practices legislation, and the state regulatory laws classifying persons on the basis of sex.

At the time of enactment of the Civil Rights Act, twenty-five states had fair employment practices laws rendering racial discrimination in employment unlawful in much the same manner as Title VII. Hence, there was some question as to the interrelationship of the Equal Employment Opportunity Commission and the state agencies enforcing antidiscriminatory legislation. Section 708 sets the tone for cooperation with the states by providing that:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.<sup>84</sup>

To further encourage state initiative in this area, a sixty day deferral to the state agency is required where there is an applicable state law.<sup>85</sup> The Commission is empowered to agree with a state or local agency not to participate in a particular class of cases.<sup>86</sup> Such an agreement removes the federal right otherwise available to aggrieved individuals. At present, ten states prohibit sex discrimination in their fair employment practices laws.<sup>87</sup> In these states, the Commission has deferred to the state agencies.

State laws which discriminate between the sexes are more of a problem to the administration of Title VII. This problem is peculiar to the sex area, since laws based on the other forms of discrimination would be struck down as invalid under the fourteenth amendment. At the time of the enactment of Title VII, all but seven states had laws limiting the hours that women could be required to work.<sup>88</sup> About half the states prohibited

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84. 42 U.S.C. § 2000e-7 (1964).

85. *Id.* § 2000e-5. This section also provides that the period of deferral shall be extended to 120 days where the state law is still in its first year of effectiveness.

86. *Id.* § 2000e-8.

87. Arizona, Hawaii, Maryland, Massachusetts, Missouri, Nebraska, New York, Utah, Wisconsin, Wyoming. WOMEN'S BUREAU, U.S. DEPARTMENT OF LABOR, LAWS ON SEX DISCRIMINATION IN EMPLOYMENT 4 (1965). All but two of these were enacted since the Civil Rights Act became law.

88. PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON PROTECTIVE LABOR LEGISLATION 9 (1963).

night work by women. Many states fixed the maximum weight a woman could be required to lift in the course of her employment.<sup>89</sup> Such laws were designed primarily for the protection of women, and have been upheld within the confines of the test of reasonableness.<sup>90</sup> Some of the protective statutes have been unsuccessfully challenged as anachronisms, as unduly restrictive measures, or as outright discriminations against women to "protect men's rights to the better paying jobs."<sup>91</sup>

Section 708 of the act<sup>92</sup> is relevant to these statutes, but it begs the question as to which state laws are invalid under the act. Thus, the Commission must decide which state laws seem to contravene the policy of Title VII.

The Commission has not adopted an extreme approach to the problem. It might have decided to permit all state regulatory laws passing the constitutional test of reasonableness. In view of the liberal test that has been applied to such state legislation by the Supreme Court,<sup>93</sup> this would probably mean that all existing state legislation would be valid. The saving clause in section 708, denying validity to state laws contrary to the policy of Title VII, would then have no effect, except to invalidate any future legislation so arbitrary as to be unconstitutional.

Conversely, the Commission might have decided that the policy of Title VII required invalidation of any state legislation that purported to classify persons on the basis of sex. This would be improper, however, in view of the "bona fide occupational qualification" exception. This interpretation of section 708 would also contradict Title VII's general policy of accommodating the interests of the states.

The Commission's approach has been to divide state laws regulating female employment into two categories: (a) those which prohibit employment of women in hazardous, arduous, or nocturnal jobs; and (b) those which confer special benefits on

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89. *Ibid.* These laws place varying ceilings on the weight a woman can be required to lift. Fifteen pounds (Utah) is the minimum; twenty-five pounds is typical.

90. See note 47 *supra*.

91. 110 Cong. Rec. 2580 (1964) (remarks of Representative Griffiths of Michigan).

92. Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7 (1964).

93. See note 47 *supra*.

women when employed, such as laws regulating minimum wages.<sup>94</sup> Those laws falling into category (a) will be studied by the Commission to determine their validity in the context of modern conditions.<sup>95</sup> The Commission questions whether:

Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception. However, in cases where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination.<sup>96</sup>

Those laws falling into category (b) will not qualify for the "bona fide occupational qualification" exception. Thus, an employer cannot refuse to hire a woman "in order to avoid providing a benefit for her required by law—such as minimum wage or premium overtime pay."<sup>97</sup> However, since such laws merely provide special benefits for employed women rather than discriminatingly prohibit their employment through discrimination, they are not invalid. Therefore, an employer who hires women must comply with these laws, and an interesting question is therefore presented as to what an employer must pay to his male employees. If the provisions of the act are now applied, it would seem that the employer must pay his male employees what the woman is receiving, and the men receive the benefit of a state law intended only for women. Such a result is beyond the intention of the federal statute, and thus should not be reached.

This approach of the Commission, falling between the two possible extreme positions discussed above, seems justified only so long as the process of ruling on state laws is done gradually, starting with those statutes which most clearly operate in a discriminatory manner.

### CONCLUSION

The sex provisions of the Civil Rights Act of 1964 have received relatively little publicity compared to that given the parallel provisions banning racial discrimination, yet the sex provisions potentially affect a far greater number of Americans. Their

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94. Equal Employment Opportunity Commission, *Guidelines*, *supra* note 75, § 1604.1(a) (3).

95. *Id.* § 1604.1(b).

96. *Id.* § 1604.1(c).

97. *Id.* § 1604.1(c) (2).

impact on nearly every employer in the nation could have a profound effect on traditional patterns of employment. Despite the significance of this new law, there is ambiguous language in the text of the statute and a dearth of meaningful legislative history. With so much uncertainty and so much at stake, the Commission faces a difficult task in enforcing the sex provisions of the act.

Deprived of precise language and legislative history for guidance in interpretation, the Commission should attempt to treat each of the prohibited forms of discrimination under the act so as to conform with national policies developed in related areas. In this regard, the considerable tolerance in our Constitution for the numerous state laws classifying persons on the basis of sex must be considered. The contrast with the intolerance of racial classification is relevant. The prohibition of sex discrimination is novel legislation, and its goals are therefore uncertain. For this reason the Commission should proceed cautiously with respect to the sex provisions, building on experience in individual cases rather than establishing rigid guidelines at the outset.

The work of the Commission thus far has convinced many that its statutory powers are too limited for the job it must do. Thus, a power to issue cease and desist orders would facilitate administration of the act. At the same time, the Commission should modify its position on the sex provisions through a broader interpretation of the "bona fide occupational qualification" exception.

Finally, with respect to the problem of state laws bearing on the matter of classification by sex, the spirit of cooperation with the state fair employment practices legislation is noteworthy. On the other hand, there is also much state legislation regulating employment of women which potentially frustrates the policy of Title VII. The difficulty of separating those laws which protect women from those which in effect discriminate against them creates a problem for the Commission; so far, the Commission had adopted a flexible and sensible position.

